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No. 07-932

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SUPREME COURT, U.S.

In The Supreme Court of the United States

STEVEN H. UNTRACHT, M.D., Ph.D., F.A.C.S.,

Petitioner,

vs.

ERDEN FIKRI, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Conemaugh Health System and Memorial Medical Center state that there are no parent corporations or any publicly held company that owns 10% or more of the corporation's stock.

Associated Anesthesiologists of Johnstown states that there are no parent corporations or any publicly held company that owns 10% or more of the corporation's stock.

UPMC Health System is the sole member of UPMC Lee Regional Health System. UPMC Health System states that there are no parent corporations or any publicly held company that owns 10% or more of the corporation's stock.

Lee Regional Health System is the parent company of Lee Regional Health System Foundation. Lee Regional Health System states that there are no parent corporations or any publicly held company that owns 10% or more of the corporation's stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The "Lee Respondents," consisting of UPMC Lee Regional Hospital, UPMC Health System, Inc., Lee Regional Health System, Inc., Lee Regional Health System Foundation, Inc. and Drs. Fikri, Mathur, Fiorica, Wahl, Ergas, Ridella, Murali, Farthing, Gunnlaugson, Cartwright, Carney, Slater and Benz, Denise Weisbrodt, R.N., and David Davis; and the "Conemaugh Respondents," consisting of Conemaugh Health System, Memorial Medical Center, Associated Anesthesiologists of Johnstown and Drs. Saluzzo, Kolff, Duke, Pai, Fritz, Weygandt, Carney and Fry, submit the following joint brief in opposition to Dr. Untracht's petition for certiorari.

I. INTRODUCTION

Dr. Untracht's petition for certiorari echos many of the same unsubstantiated allegations, self-serving declarations and downright fabrications that have dominated his claims from the very beginning. Dr. Untracht portrays himself as the crusading whistle-blower against what he proclaims to be the greed and incompetence of his surgical peers and the institutions in which they practiced; and whose efforts were rewarded by censure, exclusion and blacklisting through a process he calls "sham peer review."

The reality is that Dr. Untracht has been dismissed or resigned under a cloud of suspicion from

every institution at which he practiced. Dr. Untracht was dismissed from the medical staffs of Lee and Conemaugh Hospitals because of his startling lack of judgment, his refusal to accept his own limitations or the limitations of those institutions, and his attempts to blame others for his own shortcomings. The district court and the Court of Appeals were not fooled by Dr. Untracht's concocted factual claims or convoluted legal arguments. None of the issues for which Dr. Untracht has now sought review have any merit whatsoever. For the reasons that follow, his petition for certiorari should be denied.

II. STATEMENT OF THE CASE

A. Factual Background

As the district court noted in its August 30, 2006 opinion, *Untracht Petition*, pp. 4a-89a, Dr. Untracht began his medical career at New Jersey's Garden State Medical Center. In April 1990, Dr. Untracht had his Marlton Hospital privileges summarily suspended. Dr. Untracht responded by filing a series of lawsuits in the state and federal courts, alleging a multitude of claims against a multitude of respondents. Each dismissal of one of Dr. Untracht's lawsuits spawned another lawsuit; but eventually all were dismissed as meritless. *See, e.g., Untracht v. West Jersey Health Systems*, 803 F.Supp. 978 (D. N.J. 1992), *aff'd*, 998 F.2d 1006 (3d Cir. 1993); *Untracht v. Kelly*, Civ. No. 93-cv-04563 (D. N.J.); *Untracht v. Weimann*, 141 Fed. Appx. 46 (3d Cir. 2005).

In 1992, Dr. Untracht fled to Corning Hospital in New York. By 1993, Dr. Untracht had accumulated at least seven instances of questionable patient care and clinical judgment at that institution. *Untracht Deposition* (Document 141, pp. 456-467). Dr. Untracht admitted that his peers at Corning Hospital had rated him "needs improvement," the lowest possible rating, in at least three categories: clinical judgment, infection control and ability to work with others. *Untracht Deposition* (Document 141, pp. 470-473). After Dr. Untracht left Corning Hospital, Dr. O'Neil, the Hospital's medical director, wrote in reference to Dr. Untracht's tenure that, "issues of clinical judgment and management were raised on several occasions." *Untracht Deposition* (Document 141, pp. 484-85).

Once again, Dr. Untracht relocated. He applied for and was granted privileges at Lee Regional Hospital in Johnstown, Pa. in late 1994. Although Dr. Untracht claimed that Lee had recruited him to avoid the loss of patients to its then-competitor, Conemaugh, Dr. Untracht applied for and was granted privileges at Conemaugh a few months later, in early 1995. (Document 133, ¶29). By 1996, Dr. Untracht also had staff privileges at Windber Hospital, which is located within 10 miles of Conemaugh and Lee. (Document 147, Exhibit "1", ¶¶20, 22).

UPMC Lee Regional Hospital

Dr. Untracht's problems resurfaced when he reapplied for privileges at UPMC Lee in 1999. Dr. Fikri, Chairman of Lee's Department of Surgery, would not recommend Dr. Untracht's reappointment to Lee's surgical staff. As a result, UPMC Lee's Medical Staff Credentials Committee hired Dr. Milburn Jessup to conduct an outside review of Dr. Untracht's surgical cases. Dr. Jessup reported that Dr. Untracht had displayed poor judgment in two of the nine cases submitted to Dr. Jessup for review. Both of those cases involved fatalities. (Document 155, Exhibit "A", p. 8). The Credentials Committee adopted Dr. Jessup's recommendations. Dr. Untracht's surgical privileges were, however, renewed for an abbreviated appointment through July 2000 with certain requirements for continuing peer review. Among those requirements were that Dr. Untracht have a series of surgeries supervised by a surgeon from UPMC Presbyterian Hospital.

Dr. Untracht, responding as he had in New Jersey, filed a lawsuit against UPMC Lee in the Court of Common Pleas of Cambria County, Pennsylvania, to enjoin Lee from carrying out the recommended peer review activities or imposing a requirement that Dr. Untracht have a second surgeon present when he performed liver or pancreatic resections.[1] This lawsuit

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[1] This became a requirement that was imposed on all surgeons at UPMC Lee at the time. (Document 155, Exhibit "A").

is referred to as "UNTRACHT I." (Document 142, Exhibit "A").

In March 2000, UPMC Lee selected Dr. George Benz of UPMC Presbyterian Hospital to review Dr. Untracht's performance. Based on a review of records and personal observation of six operative procedures, Dr. Benz found fault with Dr. Untracht in four instances. (Document 155, Exhibit "A"). Dr. Benz recommended that Dr. Untracht have a second board-certified surgeon present for all major abdominal surgeries. (Document 155, Exhibit "A"). Dr. Untracht responded by submitting an exhaustive written attack on Dr. Benz to the Credentials Committee. Following an evidentiary hearing, the Credentials Committee recommended to the UPMC Lee Medical Staff Executive Committee that Dr. Untracht's clinical privileges be made subject to the second surgeon requirement proposed by Dr. Benz. (Document 155, Exhibit "A", p. 9).

Dr. Untracht responded to the Credentials Committee recommendation by filing a second lawsuit against Erden Fikri, M.D., Vincent Fiorica, M.D., Terry Wahl, M.D., David R. Davis, and UPMC Lee in the Court of Common Pleas of Cambria County. "UNTRACHT II." (Document 142, Exhibit "A"). UPMC Lee's Medical Executive Committee nonetheless voted to recommend to the Board of Directors that the second surgeon requirement be imposed. Dr. Untracht was advised that he could request a hearing before a panel of physicians prior to that recommendation being forwarded to the Board. (Document 155,

Exhibit "A"). Dr. Untracht requested a hearing, but also filed a Petition for Preliminary Injunction in the Court of Common Pleas of Cambria County seeking to enjoin UPMC Lee from enforcing the second surgeon requirement. (Document 142, Exhibit "C").

On September 17, 2001, UPMC Lee moved to dismiss the petition for preliminary injunction. After oral argument and consideration of written briefs, the Court of Common Pleas of Cambria County issued an Order dated November 20, 2001, "staying all proceedings before the Court pending completion of the internal remedies afforded Plaintiff under the UPMC Lee Hospital's Medical Staff Bylaws." The Court also enjoined UPMC Lee from filing a report with the National Practitioner Data Bank ("NPDB"), as required by 42 U.S.C. §11101, *et seq.*, until permitted to do so by the Court. (Document 142, Exhibit "D").

On November 30, 2001, the internal hearing requested by Dr. Untracht began before a Hearing Panel of the three agreed upon physicians. (Document 155, Exhibit "A", p. 2). Hearing sessions thereafter were held on December 1, 4, 14, 2001, January 4, 5, 12, 23, 2002, March 22, 2002, April 17, 24, 2002, May 2, 2002, August 14, 15, 2002, October 8, 2002, November 14, 20, 2002, December 16, 2002 and January 15, 2003. UPMC Lee also retained a third physician, Dr. Harvey Slater, to conduct a review of Dr. Untracht's cases. Dr. Slater also concluded that the previous recommendations were appropriate.

During the months in which the hearings were being conducted, Dr. Untracht filed two additional motions with the Court of Common Pleas of Cambria County in an effort to derail the peer review process and influence the hearings. Each time, the Cambria County Court held that it would not intervene in UPMC Lee's ongoing internal hearings. Refusing to accept these rulings, Dr. Untracht unsuccessfully appealed to the Pennsylvania Superior Court and then the Pennsylvania Supreme Court.[2] When all else failed, he filed a third lawsuit in the Cambria County Court against witnesses and potential witnesses in the internal hearings. "UNTRACHT III." (Document 155, Exhibit "A", n.2; Document 142, Exhibits "A" and "B").

On March 7, 2003, following the completion of the eighteen hearing sessions, the Hearing Panel unanimously found that the recommendation that Dr. Untracht have a second surgeon present for all major abdominal surgeries was proper, was supported by substantial evidence and should be implemented. (Document 155, Exhibit "A", p. 23). The Hearing Panel report also stated, in pertinent part that:

> The Hearing Panel wishes to comment that the matters before it were serious and the Hearing Panel focused directly on Dr. Untracht's medical judgment. The Hearing

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[2] Dr. Untracht's Petition for Allowance of Appeal was denied by Order of the Pennsylvania Supreme Court dated March 1, 2003. (UNTRACHT I).

> Panel further wishes to comment that while it recognized that all physicians may, on occasion, make mistakes and learn from them, it is the Hearing Panel's belief that Dr. Untracht has not and does not seem inclined to accept criticism. This case is much deeper than Dr. Untracht's lack of collegiality but stems from an attitude that may not recognize his limitations or the limitations of the institution in which he practices. It is for that reason and the facts that support the recommendation that the Hearing Panel believes that supervision is necessary for the protection of the patient.

(Document 155, Exhibit "A", pp. 22-23).

Following Dr. Untracht's unsuccessful appeal of the Hearing Panel's recommendation to the UPMC Lee Board of Directors, the Chairman of the Board referred the matter to an Appellate Review Panel, which reviewed the extensive evidence and Dr. Untracht's oral argument. (Document 147, Exhibit "15"). On April 28, 2003, the Board's Appellate Review Panel issued a Statement of Recommendation that Dr. Untracht's application for reappointment to the Medical Staff be denied and that his clinical privileges be terminated entirely.[3] (Document 155, Exhibit

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[3] The Board's Appellate Review Panel acknowledged that while the Hearing Panel had no authority to impose a more stringent sanction on Dr. Untracht, the Board's Appellate Review Panel bore the ultimate authority to assure the competency of its medical staff and protect the hospital patients.

(Continued on following page)

"A", p. 2). UPMC Lee's Board adopted the Statement of Recommendation of its Appellate Review Panel and directed that a joint committee of the Board and the Medical Staff review the Recommendation that Dr. Untracht's staff privileges be terminated. (Document 155, Exhibit "A", p. 2).

On May 27, 2003, the Joint Committee made up of members of UPMC Lee's Board of Directors and Medical Staff heard oral testimony and argument from Dr. Untracht. At the conclusion of these proceedings, on June 24, 2003, UPMC Lee's Board of Directors decided to terminate Dr. Untracht's clinical privileges. (Document 147, Exhibit "15", p. 2; Document 155, Exhibit "A", p. 2).

On September 4, 2003, the Court of Common Pleas of Cambria County vacated its December 20, 2001 Order enjoining UPMC Lee from reporting to the National Practitioner Data Bank. (Document 147, Exhibit "13"). UPMC Lee thereafter fulfilled its statutory obligation by reporting Dr. Untracht's termination of privileges to the National Practitioner

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Consistent with the UPMC Lee Bylaws, the Board's Appellate Review Panel had the authority to impose a more stringent sanction, if necessary, to protect patient safety. Therefore, the Board's Appellate Review Panel concluded that the evidence against Dr. Untracht presented during the hearing, much of which post-dated the original recommendations of the Credentials and Executive Committees, supported a more stringent sanction than had originally been recommended. (Document 155, Exhibit "A", p. 2).

Data Bank pursuant to 42 U.S.C. §11101, *et seq.* (Document 137).

Conemaugh Health System

Dr. Untracht's problems at Conemaugh resulted from an incident with one of Dr. Untracht's patients that occurred on November 22, 2002. On that date, Dr. Untracht operated on an 85-year old Jehovah's Witness patient who was suffering from colorectal cancer. The patient died from blood loss during the surgery. Dr. Untracht refused to accept any responsibility for the patient's death, which he tried to blame on the anesthesiologists who had attended to the patient during the procedure. (Document 147). Dr. Untracht later accused the anesthesiologists of deliberately sabotaging the operation by administering a "*lethal* combination of drugs," out of professional jealousy toward Dr. Untracht. *First Amended Complaint*, p. 2 (emphasis in original). *See also Untracht Deposition* (Document 141, pp. 90-91).

On November 27, 2002, following a preliminary investigation, Conemaugh suspended Dr. Untracht's clinical privileges. (Document 147). Thereafter, on December 17, 2002, Conemaugh's Credentials Committee voted to revoke Dr. Untracht's clinical privileges, based on what appeared to be his mismanagement of the patient's care, Dr. Untracht's attempt to shift the blame for the patient's death to the anesthesiologists and others and his violation of Conemaugh's Medial Staff Bylaws due to his failure

to sign a third-party release of his credentialing records. *Second Amended Complaint*, ¶85. (Document 147, Exhibit "23").

Two days later, on December 19, 2002, Dr. Untracht met with the patient's family. Dr. Untracht suggested that the family sue the anesthesiologists and directed them to a prominent malpractice attorney in Pittsburgh. Dr. Untracht had called the attorney prior to meeting with the family. Dr. Untracht suggested to the attorney that he had two good lawsuits waiting to be filed; one on behalf of the patient's family against the anesthesiologists and another on behalf of Dr. Untracht against his perceived adversaries. Dr. Untracht indicated to the lawyer that his interests were aligned with those of the patient's family and that he would be a "third-party beneficiary" of the lawsuit filed on their behalf. *Untracht Deposition* (Document 141, pp. 35-36).

Evidently, the attorney solicited by Dr. Untracht did not see things Dr. Untracht's way. Dr. Untracht was rewarded for his efforts with a single lawsuit filed against him. The anesthesiologists were not parties to the case. Conemaugh was the only other defendant in the case, based solely on the theory that it had negligently credentialed Dr. Untracht. (Document 147, Exhibit "5").

The lawsuit against Dr. Untracht eventually was resolved in a manner that avoided yet another blemish on Dr. Untracht's record. At the conclusion of an extended mediation, the parties (including Dr. Untracht)

agreed to a high-low arbitration procedure. After a brief evidentiary hearing, the mediator-turned-arbitrator entered an award in favor of the respondents, which resulted in a payment to the patient's family in the amount of the "low" verdict of $375,000.00. *Second Amended Complaint*, ¶97. *See also* Document 147, Exhibit "9". The high-low arbitration procedure, conducted with Dr. Untracht's approval, allowed Dr. Untracht to avoid another adverse report to the National Practitioner Data Bank. 42 U.S.C. §11131(a).[4]

The Credentials Committee's December 17, 2002 decision to revoke Dr. Untracht's clinical privileges triggered Dr. Untracht's right to invoke Conemaugh's fair hearing process. *Second Amended Complaint*, ¶89. What Dr. Untracht now labels "sham peer review" was in reality a painstaking and prolonged process involving multiple hearings between March 10, 2003 and May 21, 2003. *Id.* The Hearing Panel was composed of three physicians, none of whom were Dr. Untracht's competitors. Dr. Untracht called every witness, and introduced every exhibit during the lengthy hearing process. *Second Amended Complaint*, ¶90.

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[4] A "high-low" agreement sets the parameters of the payment the plaintiff may receive after a trial or arbitration proceeding. An arbitrator's award in favor of the respondent physician is not reportable to the NPDB even though, as here, such an award results in a substantial payment to the plaintiff. *See* National Practitioner Data Bank Guidebook, p. E-13, available at www.npdb-hipdb.hrsa.gov/pubs/gb/NPDB_Guidebook.pdf.

At the conclusion of Dr. Untracht's evidence, the Hearing Panel recommended that the Credentials Committee's decision be upheld. The Panel's June 16, 2003 recommendation stated, in pertinent part:

> The evidence on this issue is undisputed, and comes from Dr. Untracht himself. He admits to having informed the patient's family of an internal investigation, suggested that someone other than himself was to blame, and encouraged them to retain a lawyer. He also admits to having threatened the physicians who rendered an unfavorable peer review report concerning him. These actions, particularly those related to the peer review physicians, are reprehensible, and in our judgment, these actions alone support the Committee's recommendation.

(Document 147, Exhibit "10").

The recommendations of the Credentials Committee and the Hearing Panel were forwarded to Conemaugh's Board of Trustees for final action. (Document 147, Exhibit "11"). The Board's appellate review panel found no merit in Dr. Untracht's assertion that he had been denied a fair hearing. *Id.* On August 7, 2003, Conemaugh's Board of Trustees affirmed the Hearing Panel's report and revoked Dr. Untracht's clinical privileges. (Document 147, Exhibit "12"). The suspension and termination of Dr. Untracht's privileges triggered Conemaugh's obligation to report to the National Practitioner Data Bank,

pursuant to 42 U.S.C. §11101, *et seq.*, which it did on June 9, 2003. (Document 147, Exhibit "22").

In the courts below and in his arguments to this Court, Dr. Untracht attempted to use both the Hearing Panel's negative findings and the "defense verdict" entered in the high-low arbitration as complete vindication of his clinical care. *Untracht Petition*, pp. 18-20. Dr. Untracht unsuccessfully attempted to persuade the district court that the Hearing Panel's decision should be given the effect of a jury finding that he did not mismanage the patient's care. (Document 147, pp. 87-90). Dr. Untracht ignored and mischaracterized the purpose of the high-low arbitration proceeding, and suggested that the decision should be given collateral estoppel effect, conclusively establishing that he did not mismanage the patient's care; an argument that the district court said "makes no sense." *Untracht Petition*, p. 46a. *See also* (Document 147, p. 20).

B. Proceedings Below

In the midst of the ongoing proceedings at Lee and Conemaugh, on May 14, 2003, Dr. Untracht commenced an action in the United States District Court for the Eastern District of Pennsylvania by filing a 96 page, 527 paragraph *pro se* complaint against 36 respondents, including some 20 "John Doe" respondents, as a result of the impending termination of his medical staff privileges at Lee and Conemaugh. Respondents filed motions to dismiss

and motions to transfer venue to the Western District of Pennsylvania.

On June 26, 2003, Dr. Untracht, without leave of court, filed an amended complaint consisting of 114 pages, 655 paragraphs and 15 separate counts. Respondents again filed motions to dismiss and/or transfer venue to the Western District of Pennsylvania. The case was transferred to the Western District of Pennsylvania, where it was assigned to the Honorable Kim R. Gibson of the Johnstown Division.

On May 28, 2004, Judge Gibson entered a case management order setting discovery deadlines and deadlines for motions for summary judgment. (Document 103). The court amended its case management order on June 2, 2003. (Document 104). Both orders set the close of discovery for January 3, 2005, with summary judgment motions due February 3, 2005. Respondents sent out timely discovery requests, obtained documents and, on December 20-21, 2004, recorded Dr. Untracht's deposition. (Document 141). Neither Dr. Untracht nor the various attorneys who represented him from time to time initiated any discovery until just before the deadline.

Shortly before the scheduled close of discovery, Dr. Untracht served numerous interrogatories and requests for production of documents, to which the respondents responded with answers and appropriate objections. Dr. Untracht also sought at least twenty depositions of non-parties, and indicated that he would depose the named respondents at a later date.

The respondents refused to agree to Dr. Untracht's impossible discovery schedule. On January 24, 2005, Dr. Untracht filed motions to compel respondents to respond to Rule 26(a)(1) disclosures, to provide more specific responses to his numerous interrogatories and requests for production of documents and to compel attendance at depositions. Dr. Untracht also sought leave of court to exceed the allowable number of interrogatories. (Document 118). Respondents responded at length to these motions, which the court set for hearing on February 9, 2005. (Document 119). By order dated February 11, 2005 (Document 126), the district court denied Dr. Untracht's motions, and stayed further discovery pending resolution of the dispositive motions. At the time the court entered its stay, only four days of discovery remained.

On April 7, 2005, the district court dismissed the amended complaint. The court granted Dr. Untracht twenty days in which to file a second amended complaint consistent with the court's memorandum opinion. (Document 131). Dr. Untracht filed his second amended complaint on April 25, 2005. (Document 133). Respondents again filed motions to dismiss, or in the alternative for summary judgment, with respect to the second amended complaint. (Documents 136-142). None of the parties sought to reopen the discovery period, which therefore closed on April 11, 2005.

On July 18, 2005, Dr. Untracht filed a "motion for assumption of supplemental jurisdiction, a motion for injunctive relief and motion for summary

judgment." (Document 146). Respondents opposed this motion. (Documents 151, 154). The district court denied Dr. Untracht's motion for leave to file reply brief (Document 159), and ordered that no party make any further filings until the disposition of the pending motions. (Document 166).

In a memorandum opinion and order dated August 30, 2006, the court granted respondents' motions for summary judgment and motions to dismiss, denied plaintiff's various motions and entered judgment in favor of all respondents. (Document 167, 168). *See also Untracht v. Fikri*, 454 F.Supp.2d 289 (W.D. Pa. 2006), *Untracht Petition*, pp. 4a-89a. The district court found no evidence to support any of Dr. Untracht's far-fetched claims.

On September 22, 2006, Dr. Untracht filed a notice of appeal from the judgment of the district court. (Document 169). The Court of Appeals gave Dr. Untracht every opportunity, including oral argument, to produce any fact or legal theory that the district court may have overlooked. Dr. Untracht was unable to do so, and the Court of Appeals therefore affirmed the judgment of the district court on the basis of the "very thorough 69 page memorandum opinion of the District Court, the appellate briefs of the parties and the oral argument before this Court." *Untracht Petition*, p. 3a. By order dated October 30, 2007, the Third Circuit denied Dr. Untracht's petition for rehearing *en banc*. *Untracht Petition*, pp. 105a-106a. On January 11, 2008, Dr. Untracht filed the petition

for writ of certiorari to the Court of Appeals for the Third Circuit.

Dr. Untracht spends the majority of his petition addressing "Sham Peer Review, a Mask for Evil," *Untracht Petition*, p. 8, a topic that appears to have little or nothing to do with the three questions submitted for review. Dr. Untracht limits the questions presented for review to the following:

1. Whether the respondents' compliance with the mandatory reporting requirements of the federal Health Care Quality Improvement Act, 42 U.S.C. §11101 *et seq.*, made them "state actors" for purposes of 42 U.S.C. §1983?

2. Whether 42 U.S.C. §1981 protects against discrimination by reason of "American" national origin?

3. Whether the Third Circuit's issuance of a "not precedential" decision violated Dr. Untracht's constitutional guarantee of equal protection?

For the reasons that follow, none of the issues submitted for review have any merit whatsoever.

III. REASONS FOR DENYING THE WRIT

A. Dr. Untracht failed to raise the claimed §1983 violation in the courts below.

In his brief to the Court of Appeals for the Third Circuit, Dr. Untracht expressly limited his argument with respect to his §1983 claim to the following:

> In this Appeal, Plaintiff limits his argument to the state nexus for each of the Lee respondents, based on their exploitation of Cambria County Common Pleas Judges F. Joseph Lehey and Thomas A. Swope, Jr. for the purpose of depriving plaintiff of Constitutional rights.

Untracht Brief, p. 35.

Dr. Untracht did not raise on appeal any §1983 issue with respect to the Conemaugh respondents. Dr. Untracht never raised the issue on which he now seeks review, namely, that the respondents became state actors simply by complying with the federal Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §11101 *et seq.*, and specifically the reporting requirements set forth in §11133 thereof.

Amicus raised the issue on which Dr. Untracht now seeks review for the first time in its brief to the Third Circuit. Amicus failed to cite any authority to support its novel theory. Because Dr. Untracht himself failed to raise and preserve this fanciful theory in the courts below, this Court should decline to consider it.

B. Dr. Untracht's §1983 claim is without merit in any case.

1. 42 U.S.C. §11101 *et seq.*, is a federal, not a state statute.

Section 1983 provides relief against respondents who act under color of state, not federal law. *Wheeldin v. Wheeler*, 373 U.S. 647, 650, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963), *cited in Khan v. United States of America*, 271 F.Supp.2d 409 (E.D. N.Y. 2003). The fact that UPMC Lee and Conemaugh did what they were mandated to do under *federal* law, by reporting Dr. Untracht to the NPDB, does not constitute acting under color of *state* law for purposes of §1983.

2. Compliance with a statutory mandate does not convert a private party into a state actor.

In making reports to the National Practitioner Data Bank, the respondent Hospitals simply did what the federal statute obligated them to do. Compliance with a federal statutory mandate, however, does not convert the respondents' actions into state actions or the respondents into state actors for purposes of §1983. If it did, everyone who paid their federal income taxes on time would automatically become a state actor for purposes of §1983.

Recipients of federal or state funds of any kind generally must comply with a multitude of statutes, regulations, policies and procedures. This Court has never held that the mere receipt of federal or state

funds is sufficient to make the recipient a federal or state actor. *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), *cited in*, *Regents of University of California v. Bakke*, 438 U.S. 265, 384 n.3, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (White, J. concurring). *See also*, *e.g.*, *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563 (3d Cir. 1978) (private hospital's receipt of Medicare, Medicaid and Hill-Burton funds, existence of tax exemption and state licensing requirements for non-profit hospitals did not constitute state action for purposes of §1983); *Benn v. Universal Health System, Inc.*, 371 F.3d 165 (3d Cir. 2004) (compliance with mental health commitment statutes does not make hospital a state actor for purposes of §1983). If recipients of federal or state funds do not become state actors by virtue of such receipt, *a fortiori*, a private party is not transformed into a state actor merely because he complies with a statutory mandate. The additional fact that Dr. Untracht, with his multiple adverse Data Bank reports, now claims that no hospital will grant him membership to its medical staff does not convert the action into state action or the respondents into state actors.

C. Section 1981 does not protect against discrimination by natural origin.

Section 1981, 42 U.S.C. §1981, does not prohibit discrimination based solely on the place or nation of a person's origin. *St. Francis College v. Al Khazraji*, 481 U.S. 604, 613 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987).

"Race" may be defined broadly to include classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. *St. Francis*, 481 U.S. at 609. Thus, in *St. Francis*, the plaintiff could raise a §1981 claim based on his Arab ethnicity, even though he could not state a claim based solely on his country of origin.

As *St. Francis* makes clear, the question before the Court was not whether Arabs would be considered a separate race by today's standards, but whether, at the time §1981 was adopted, Arabs constituted a group of people that Congress intended to protect. Based on the legislative history of §1981, the Court concluded that Arabs were among the peoples then considered to be a distinct race and hence within the protection of the statute. *See also Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987) (Jews considered a distinct ethnic group by 1866 standards for purposes of §1982).

In contrast to the plaintiffs in *St. Francis* and *Shaare Tefila*, Dr. Untracht based his §1981 claim exclusively on his status as an "American born and educated" surgeon. The courts below properly concluded that this did not state a legally cognizable claim of discrimination under §1981. "American birth" says nothing about a person's ethnicity. Abraham Lincoln and Frederick Douglas were "American

born."[5] Dr. Untracht's American birth simply is not a protected category under §1981.

D. Even if Dr. Untracht's §1981 claims were to be construed as based on race or ethnicity, the courts below were correct in concluding that Dr. Untracht failed to make out a *prima facie* case.

Even assuming that Dr. Untracht had asserted reverse discrimination based on his race rather than his national origin, the courts below were correct in concluding that he failed to set forth any evidence establishing that any similarly situated doctors were treated differently. Under the familiar burden-shifting approach first adopted by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a plaintiff must first establish a *prima facie* case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. 411 U.S. at 802, 93 S.Ct. 1817. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the

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[5] Abraham Lincoln was born February 12, 1809 in Hardin County, Kentucky. www.whitehouse.gov/history/presidents/all6.html. The noted abolitionist Frederick Douglas was born into slavery on the Eastern Shore of Maryland in 1818. www.nps.gov/archive/frdo/fdlife.htm.

employer's explanation is pretextual. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Dr. Untracht failed to establish a *prima facie* case, because he failed to produce any evidence that similarly situated doctors were treated differently. *Untracht Petition*, p. 81a, n.19.

In order to survive summary judgment when the respondent has articulated a legitimate nondiscriminatory reason for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a fact finder could reasonably either: 1) disbelieve the employer's articulated reason; or 2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Dr. Untracht offered not one iota of evidence that the reasons given by the respective Hospitals for his dismissal were not the real reasons; and based on the evidence, no analysis could support such a claim. After exhaustive investigations and reviews, during which Dr. Untracht was afforded all of the procedural rights to which he was entitled, the respondent Hospitals each found ample reasons for dismissing Dr. Untracht from their medical staffs. Dr. Untracht offered no evidence, save his own imaginings and speculations, that the stated reasons for his removal were not the real reasons.

E. The Third Circuit's issuance of a "not precedential" opinion did not deprive Dr. Untracht of equal protection.

While urging the Court to enter a summary adjudication in his favor, Dr. Untracht cites *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000), for the proposition that the Third Circuit's issuance of a "not precedential" decision in his case somehow deprived him of his constitutional right to equal protection of laws. He cites the "not precedential" designation as affirmative proof that the Court of Appeals engaged in a "less than rigorous analysis," or, in his case, "no analysis at all." *Untracht Petition*, p. 33. Dr. Untracht's real complaint is that the Third Circuit simply did not see things his way.

Under Chapter 5 of the Third Circuit's Internal Operating Procedure (I.O.P.), there are two forms of opinions: precedential and not precedential. A majority of the Panel determines whether an opinion is designated precedential or not precedential, unless a majority of the active judges of the court decides otherwise. I.O.P. 5.1. An opinion is designated precedential when it has precedential or institutional value. I.O.P. 5.2. A "not precedential" opinion is one that appears to have value only to the trial court or the parties themselves. I.O.P. 5.3. The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedent that binds the court because they do not circulate to the full court before filing. I.O.P. 5.7. Rule 32.1

of the Federal Rules of Appellate Procedure, however, permits citation to decisions designated as not precedential issued on or after January 1, 2007.

In *Anastasoff*, the Eighth Circuit held that its local rule 28.A(i), which provided that unpublished dispositions are not precedential, violates Article III of the United States Constitution. According to that court, the exercise of "judicial power" precludes the courts from making rulings that are not binding in other cases. Commenting on the *Anastasoff* decision, the Ninth Circuit Court of Appeals stated:

> We believe that *Anastasoff* overstates the case. Rules that empower courts of appeals to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm. But such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether. Rather, it is an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted.

Hart v. Massanari, 266 F.3d 1155, 1160 (9th Cir. 2001).

In the instant case, Dr. Untracht is not claiming that the Court of Appeals disregarded some previously unpublished decision in deciding his case. Rather, he appears to contend that, by designating the decision in his case "not precedential," the Court of Appeals failed to give him any consideration at all. Having failed to produce any evidence to support his outlandish theories, and having his case summarily dismissed as a result, Dr. Untracht directs his venomous and equally outlandish theories against the Court of Appeals itself:

> By acting summarily and non-precedentially in this matter, the Third Circuit has carved out an exception to the Constitution for the Litigants alone, uniquely stripping Petitioner of inalienable rights and turning him into a disenfranchised, defrocked pariah in the county of his birth, permitting Murali, Mathur and Pai to import the caste system under which they were born and use it at will to declare Petitioner an "untouchable."

Untracht Petition, p. 34.

Like his allegation that the Lee respondents deliberately sabotaged an electrocautery device, or his even more outlandish allegation that Conemaugh's anesthesiologists deliberately killed one of his patients out of professional jealousy, Dr. Untracht's accusations against the Court of Appeals have no foundation whatsoever. The fact that the Court of Appeals could not improve upon the thorough, comprehensive and well-reasoned decision of

the district court does not give rise to a presumption that the Court of Appeals failed to consider Dr. Untracht's position at all. That Dr. Untracht did not achieve the result he wanted was due to the fact that his claims had no merit whatsoever and not any lack of consideration by the Court of Appeals.

IV. CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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